



U.S. Department of Justice

Environment and Natural Resources
Division

90-1-4-12728

Natural Resources Section
P.O. Box 7611
Washington, DC 20044

Telephone (202) 305-0437
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Via Overnight Delivery & Electronic Mail

DRAFTMay 30, 2014***DRAFT***

Mr. Paul Kampmeier
Washington Forest Law Center
615 Second Avenue, Suite 360
Seattle, Washington 98104-2245
Tel: (206) 223-4088
pkampmeier@wflc.org

Re: Informal Dispute Resolution Period, *Northwest Environmental Advocates v. Locke, et al.*, No. CV09-0017-PK (D. Or.)

This letter responds to your May 9, 2014, letter, in which you initiated the thirty-day informal dispute resolution clause contained in Paragraph 9 of the parties' September 2010 Settlement Agreement, and your May 27, 2014, letter, in which you proposed a possible resolution to that dispute following the May 20 conference call between Northwest Environmental Advocates and EPA and NOAA.

EPA and NOAA remain committed to the Settlement Agreement and making a final determination under 16 U.S.C. § 1455b(c) on Oregon's Coastal Nonpoint Pollution Control Program (CNPCP). As you are aware, the agencies have been delayed in making that final determination due, in part, to scheduling delays that originated with the October 2013 lapse in federal appropriations, combined with the number and extent of comments received in response to the December 13, 2013, proposed finding.

On April 14, 2014, EPA first communicated to Advocates that the agencies were unlikely to meet the previously-agreed May 15, 2014, deadline for final action. EPA made that contact because both agencies take very seriously the commitments made in the Settlement Agreement. Their belief in the integrity of the Agreement also led the agencies to meet with Advocates on May 7 and May 20 to discuss the timing for the agencies' final determination and Oregon's progress on submitting an approvable CNPCP.

EPA and NOAA greatly appreciate Advocate's willingness to accept January 30, 2015, as the date by which the agencies will take action on their proposed determination regarding the

Oregon program submission.¹ That time is necessary because of the volume and complexity of public comments; the fact that the agencies will be relying upon staff without contractor support to prepare decision-making materials; and the time necessary to fully deliberate and address the precedential issues involved, including the processes associated with across-agency decision-making. Though we do not believe it to be necessary, the EPA and NOAA are willing to discuss amending the current Agreed Order and/or Settlement Agreement to incorporate that new date. As you and I discussed, there may be legal issues associated with any such amendment that we would need to consider. Of course, any such changes would require approval from those Government officials with settlement authority.

Advocates has also sought some additional assurances that the agencies will remain on track in meeting the January 30 date. Your May 27 letter provides two ways in which EPA and NOAA could provide that assurance: (1) by amending the Agreed Order to expand the enforcement provisions beyond what is already present in Paragraph 3; and (2) by agreeing to an internal schedule to make sequenced and wholly-independent final determinations on the four outstanding issues in Oregon's CNPCP.

Though both agencies unquestionably remain committed to the new schedule, we do not believe the proposed assurance mechanisms are appropriate. The remedy limitations in Agreed Order Paragraph 3 were a key part of the agencies' willingness to enter into the Settlement Agreement. If anything, their reasoning in support of that limitation is even stronger now given the progress that has been made toward a final determination on Oregon's submission. After much contemplation and discussion, the agencies have also concluded that the proposal to sequence the agencies' determinations regarding outstanding issues is unworkable. Structuring EPA's and NOAA's decision-making in such a way would add significant transaction costs; shorten timeframes for full deliberation, which could hamper thoughtful and robust analysis and development of a defensible administrative record for final action; and deprive Oregon of a coherent and integrated response on a significant action.

Despite those concerns, EPA and NOAA recognize the shift in expectations that a January 30 decision date causes for Advocates. And the agencies continue to appreciate that Advocates' entry into the Settlement Agreement involved some significant compromises. They therefore propose the following additional assurances that EPA and NOAA remain committed to the Settlement Agreement:

- EPA and NOAA would provide Advocates with bi-monthly written check-ins on progress being made toward meeting the January 30 date (e.g., by July 30, September 30, and November 30); and
- EPA and NOAA would send a letter to Oregon that would: (1) inform the State of the new decision-making schedule; (2) clarify that the agencies' review of Oregon's program submission is based upon the record and information provided during the

¹ EPA and NOAA recognize that public comments may yet demonstrate to the agencies that Oregon has not failed to submit an approvable program.

public comment period; and (3) state affirmatively that the agencies will begin application of the grant withholding provisions from the allocated grant funding amounts available in FY2015 should the agencies' forthcoming determination confirm the proposed finding that the State has not submitted an approvable program. EPA and NOAA would provide Advocates with a copy of this letter.

We are hopeful the assurances stated above and EPA's and NOAA's commitment to make a final determination prior to January 30, 2015, will resolve the dispute raised in your May 9 letter. EPA and NOAA look forward to Advocates' response.

Finally, pursuant to Paragraph 10 of the Settlement Agreement, we take this opportunity to update the individuals to whom Northwest Environmental Advocates should direct any notices under the Agreement. Please substitute Jeff Dillen for Stephanie Campbell at the same NOAA address. Please substitute Jennifer Byrne for Ankur Tohan at the same EPA Region 10 address. Kelly Gable is no longer assigned to Region 10 CZARA matters for EPA. Please also substitute Jayne Carlin for David Powers at Ms. Carlin's EPA address:

Watersheds Unit
US EPA Region 10
1200 6th Ave, Suite 900 (OWW-134)
Seattle, WA 98101-3140.

Please note that the PO Box and zip code for my office have changed to PO Box 7611 and 20044-7611, respectively.

Sincerely,

Kristofor Swanson
Trial Attorney

cc (via e-mail): Alison LaPlante, Earthrise Law Center
Jennifer Byrne, Office of Regional Counsel, EPA Region 10
Jeff Dillen, Office of General Counsel, NOAA
Stephen Sweeney, Office of General Counsel, EPA



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Comment [KRS1]: I had assumed these would be in letter form. Please correct if I was mistaken.

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Page - 3 -

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Comment [KRS2]: Do we need to substitute Joelle for John King?

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